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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

ENRIQUETO MARTE, ET AL.,
Petitioners

v.

CHEVRON CORPORATION LONG-TERM
DISABILITY PLAN, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. How should the following conflicts between the circuits and this Court on the standard of review in ERISA cases be decided:

(a) Should review of an ERISA plan be *de novo* unless the plan document clearly grants discretion to the administrator, or may a court imply discretion to avoid *de novo* review?

(b) May a court find that the administrator of an ERISA plan has implied discretion to determine *the amount of benefit due*, or does 29 U.S.C. § 1102, which requires that ERISA plans *specify* the amount of payment, prohibit interpretation of a plan to give the administrator discretion to determine the amount of benefit?

(c) If the fiduciary authority of the panel named in an ERISA plan to decide appeals is exercised instead by the administrator, must review be *de novo* under the holding in *Firestone v. Bruch*, or may a court imply discretion to disregard the panel?

2. Is 29 U.S.C. § 1102 violated by relying on oral declarations to interpret the language of an unambiguous ERISA plan?

LIST OF PARTIES

The parties to the proceedings below were Petitioners Enriqueto Marte, plaintiff-appellee, and Daniel Aruta, Earl Kauka, and Jacinto Almeria, plaintiff intervenors-appellees. Daniel Aruta died while the appeal was pending and his wife Leonora Aruta was substituted for him pursuant to F.R.A.P. 43. The respondents before this Court are Chevron Corporation Long-Term Disability Plan, Chevron Corporation Long-Term Disability Plan Organization, and Chevron Corporation.

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ORGANIZATION, AND CHEVRON CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Enriqueto Marte, Leonora Aruta, Earl Kauka, and Jacinto Almeria respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 30, 1993.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit has not been reported and is reprinted in the appendix hereto.

The Order On Motion For Summary Judgment of the United States District Court for the Northern District of

California (Legge, D.J.) has not been reported. It is reprinted in the appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 1132(a), Petitioners brought suit in the Northern District of California. On January 2, 1992, the Northern District granted Petitioners' motion for summary judgment. The District Court then entered judgment under Fed.R.Civ.P. 54(b).

On respondents' appeal, the Ninth Circuit on November 30, 1993, entered a judgment and opinion reversing the Northern District's order and directing that summary judgment be entered for respondent. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). Petitioners request filing without prepaying fees or cost pursuant to 28 U.S.C. § 1916 as this is an action by seaman to recover employee benefits.

STATUTE INVOLVED

29 U.S.C. § 1102(a) & (b)

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an

employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

STATEMENT OF THE CASE

Preliminary Statement

The decisions in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) [ERISA preempts state law defining disability to include pregnancy] and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) [ERISA preempts state law private causes of action to enforce long term disability plan] firmly established ERISA as providing an exclusive, uniform, national policy for protection of the integrity of disability and health plans purchased in the workplace. In enacting ERISA, Congress left to federal courts the task of developing a federal common law of employee benefit plans to replace the protection formerly provided by state law. Id at 56. This

Court first addressed the task in *Firestone v. Bruch*, 489 U.S. 101 (1989). In that case the Court held that decisions of the administrator of a plan must be reviewed *de novo* unless the plan grants discretion to the administrator. Federal court decisions since *Firestone* have reached contrary results as to the applicable standard of review depending on whether the circuit applies a theory of "implied discretion" when no grant of discretion is actually found in an ERISA plan.

In this case the District Court reviewed the administrator's calculation of the amount of benefit *de novo* because the plan does not give the administrator explicit discretion to decide the amount of benefit. The Circuit Court reversed because it "implied discretion" to the administrator and in so doing sanctioned the administrator's decision to award Petitioner Kauka a long-term disability benefit averaging 53 cents a month. This case demonstrates that the "implied discretion" theory conflicts with 29 U.S.C. § 1102(b)(4) which requires that ERISA plans *specify* the amount of benefit. 29 U.S.C. § 1102 prohibits the drafting of an ERISA plan to give the administrator discretion over the amount of benefit. This rule is negated if courts "imply discretion" back into ERISA plans, allowing the administrator to decide the amount of benefit. Also at issue is a conflict between the circuits as to the propriety of "implying discretion" where the administrator violates specific plan language requiring that appeals be decided by a panel. Lastly at issue is a conflict between the circuits as to whether 29 U.S.C. § 1102, which requires that ERISA plans be written, prohibits courts from relying on oral declarations to interpret the language of an unambiguous ERISA plan. Resolution of these conflicts is necessary to fulfill ERISA's promise of establishing a uniform national law of employee benefit plans.

Underlying Dispute

Petitioners are four seamen who worked as crew members on Chevron oil tankers. In normal operation, the oil tankers are in continuous use and must be continually manned. To accomplish this schedule, crew members regularly work twelve to fourteen hours a day, seven days a week (84 to 98 hours a week). For this work, the seamen are paid a "monthly wage" from $1500 to $2000 for forty hours of work per week and a premium rate for hours over 40 per week. Because of the tremendous amount of overtime hours that they regularly work, the sailors' normal actual earnings are in the range of $4000 to $5000 per month.

Each of the Petitioners became disabled between 1983 and 1987. Each applied for disability benefits under the Chevron Corporation Long-Term Disability Plans (hereinafter "LTD Plan").[1] The Plans provide for a benefit of sixty per cent of "pre-disability earnings." Chevron found each of the Petitioners disabled and awarded the seamen an LTD benefit based on sixty per cent of their "monthly wage". This method of calculation rendered the benefit under the Plan essentially illusory.

Petitioners' cases are illustrated by the situation of Earl Kauka, a 29-year company employee who worked as a

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[1]There are two plans at issue in this case. Both cover all Chevron employees. One plan was in effect from 1981 to July 1, 1986 (1981 Plan). This Plan was paid for entirely by deductions from the wages of Petitioners and other Chevron employees who signed up for coverage under the Plan. The second plan covered employees who became disabled after July 1, 1986 (1986 Plan). Coverage under the 1986 Plan was paid for by the employer for wages up to $25,000 per year with optional coverage for wages over $25,000 per year to be paid by the employees. Both Petitioners whose cases arise under the 1986 Plan opted for coverage for wages over $25,000 per year. Deductions were not made from their wages after July 1, 1986 because of the dispute over the proper determination of covered wages which is at issue in this case.

boatswain's mate. During his employment, Mr. Kauka was paid wages averaging $4700 per month. He was offered and signed up for coverage under the LTD Plan. When Mr. Kauka became disabled, the Chevron Benefits Department staff calculated his LTD benefit as a total of $9.50 for the eighteen month period for which he qualified as disabled. The LTD income support was rendered illusory because Chevron had so reduced the base on which the LTD benefit was calculated that Mr. Kauka's benefit was almost completely offset by Social Security which is based on actual earnings.[2]

It should be noted that prior to becoming disabled, Mr. Kauka did not have notice that his benefit was essentially nil. When enrollment was offered, the brochures distributed by Chevron described the LTD benefit as equal to 60% of "annual earnings" or 60% of "pay". When Mr. Kauka signed up to cover his pay over $25,000 per year, he was not told that coverage was only being provided on his ~~month~~ly wages of $23,220 per year. After signing up for

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[2]Chevron's method of calculation was as follows:

Actual Predisability earnings (Calculated by Petitioners from the wage stubs of Petitioner)	$4,741.60/mo.	
LTD benefit as calculated by Chevron: (60% of monthly wage of $1,935.00)	$1,161.00 =	24% of Actual Predisability Earnings
Social Security disability:	-$1,207.00	
Net LTD benefit:	$ -0- =	0% of Actual Predisability Earnings

The one-time payment to Mr. Kauka of $9.50 occurred in the calculation of a partial month's benefit. Petitioners Aruta and Marte each had a lower Social Security benefit because they had no dependent children. Their LTD benefits under Chevron's calculation were $294 and $271 per month respectively. This benefit gave them a combined benefit between Social Security and the LTD Plan of 26% and 25% respectively of actual predisability income. Mr. Almeria did not receive Social Security. His LTD benefit was $1,170 per month equal to 25% of his actual predisability income.

LTD coverage, the pay sheets Mr. Kauka received each month showed his "Disability Insurance Plan Base" as his total pay, including overtime.

Decision of Claims Administrator

At the time this case arose, the Chevron LTD Plan was managed and partially insured by CIGNA Corporation, a professional benefit claims administrator. Mr. Kauka filed an appeal challenging the method used to calculate his LTD benefit. He contended that under the plain language of the LTD Plan, recognition must be given to the actual number of hours he normally or regularly worked ("regular work schedule") in determining predisability "earnings."[3]

CIGNA agreed with Mr. Kauka and recommended to Chevron that earnings during the actual work schedule must be considered in determining predisability income.[4]
This decision of the claims administrator was consistent with the only prior adjudicated appeal under the Chevron LTD Plan which had raised the issue.

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[3]The Plan defines earnings as "the straight-time wages or salary payable to an employee for the Regular Work Schedule." The Plan further defines "Regular Work Schedule" as follows:

> *"Regular Work Schedule"* means the continually recurring pattern of scheduled work established and changed as necessary by the Corporation for a job in each work week or period of work weeks to meet operating needs. (1986 Plan. The 1981 Plan uses the term "company" instead of "corporation" and is otherwise the same.)

Petitioners contend that these careful definitions of "Earnings" and "Regular Work Schedule" were intended to create a formula as follows:

> straight-time wage rate × hours regularly worked = predisability income

[4]CIGNA also recommended that the benefit be based on total pay because of the misleading information on the sailors' pay sheets.

Decision of the Plan Administrator

By the time that Mr. Kauka's appeal reached Chevron, the appeals of the three other seamen who are petitioners in this case were also pending. In purchasing insurance to cover payment of the LTD benefits, Chevron had paid a premium based on the monthly wage rate (pay for forty hours per week) and therefore was facing an unfunded liability. An executive in the Chevron Benefits Department was designated to decide Mr. Kauka's ERISA appeal. Despite the recommendation of CIGNA, he denied the appeal.

Two similar, but not identical, LTD Plans are at issue in this case, the 1981 Plan and the 1986 Plan. Coverage depends on the date of onset of disability. Two of the three other cases pending when Mr. Kauka's case was decided arose under the 1981 Chevron LTD Plan. The 1981 Plan requires that appeals under the Plan be decided by a three-person review panel. Rather than submit the appeals governed by the 1981 Plan to a review panel, the same executive in the Benefits Department denied the pending appeals under the 1981 Plan and the 1986 Plan.

District Court's De Novo Review

Petitioners then filed suit in the United States District Court for the Northern District of California, invoking federal jurisdiction under 29 U.S.C. § 1132(a). In the District Court, Chevron argued that its decision denying the ERISA appeals should be reviewed under the "abuse of discretion" standard.[5]

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[5]The Ninth Circuit has held that after *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989) the deferential "arbitrary and capricious" standard of review should go under the rubric of "abuse of discretion" in ERISA cases. *Eley v. Boeing*, 945 F.2d 276, 278 fn.1 (9th Cir. 1991). In its decision in this case, the Circuit Court uses the terms "abuse of discretion" and "arbitrary and capricious" interchangeably. See page A-6 para. 2.

Although there was no explicit grant of discretion in the LTD Plans, Chevron pointed to a section of the Plan entitled "Fiduciary Responsibilities in Plan Administration." A sentence in this section stated, "The organization shall make such rules, regulations, interpretations, and computations and shall take such other actions to administer the Plan as it may deem appropriate." The Benefits Administrator for the Plans testified that no rules or procedures had ever been adopted under this section and that it was the Plan itself which defined predisability earnings. Chevron agreed that it had not made any *written* rules, regulations, or interpretations under this section which were applicable to the Petitioners' cases. Chevron argued, however, that there is an implied grant of discretion as to any interpretation ever involved in the administration of the Plan. Chevron made this argument despite the fact that it could identify no words in the section of the Plan *governing the determination of appeals* which granted discretion to the Plan Administrator in deciding appeals.

On cross motions for summary judgment, the District Court rejected this argument. The District Court held, "This language does not itself grant *discretionary* power to the Administrator. The Plan Administrator is given administrative power, but not adjudicative authority" (page A-13). The District Court stated, "The administrator did not have the authority to select a level of benefits for an employee based on a particularized evaluation of that employee's needs or other undefined criteria. The decision involved only an application of plan language and was not a discretionary decision" (page A-14). The District Court held that review must be *de novo*.[6]

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[6]Because of this decision, the District Court did not reach the question of whether review under the "abuse of discretion" standard is appropriate in an ERISA case in which the Plan Administrator failed to permit review by an appeals panel as required by the plan language.

The District Court also found that the plain plan language required calculation of benefits based on a formula as follows: 60% of straight-time wage rate × actual regular work schedule. Upon stipulation of the parties, the District Court then entered a judgment under Rule 54(b) which Chevron appealed to the Ninth Circuit Court of Appeals.

Ninth Circuit Review for Abuse of Discretion

The Ninth Circuit reversed the decision of the District Court and directed that summary judgment be entered in favor of Chevron. The Circuit Court decided that review should be under the "abuse of discretion" standard, even though there are no explicit words in the Plan stating that the Plan Administrator has "discretion" with regard to benefit appeals. The Circuit Court refused to make a distinction between language which grants administrative power to make interpretations and language which grants adjudicative discretion.[7]

The Circuit Court also held that the "abuse of discretion" standard was applicable to the cases adjudicated under the 1981 Plan. The Circuit Court acknowledged that "Chevron breached the Plan's terms by using a single in-house reviewer instead of the three-person panel outlined in the 1981 Plan" (page A-6). The Circuit Court gave three reasons for this holding. First, it held that the result should not have been different if decided by a review panel. The Circuit Court did not explain why a different decision could not have been made by a review panel when the record of the case below showed that both the District Court and the professional benefits administrator, CIGNA, had rejected

[7]An example of this distinction is as follows: The District Court clearly had the "power" to interpret the Plan contracts and render a decision in this case. However, the District Court did not have "discretion." It was required to interpret the Plans in accordance with the facts and the law.

Chevron's interpretation. Second, the Circuit Court held there is "no substantive right to a certain plan procedure." (page A-7) The Circuit Court did not discuss whether Petitioners had a procedural right or how the Plan could be interpreted to grant the Plan Administrator discretion to decide Petitioners' cases when the Plan did not even permit the Plan Administrator to decide Petitioners' cases. Third, the Circuit Court stated that the Petitioners had cited no authority. As discussed below, the First Circuit has rendered a decision in direct contradiction to the holding in the instant case. *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 583 (1st Cir. 1993) [holding that the "abuse of discretion" standard is not the appropriate standard of review when the Plan Administrator decides claims unilaterally, in violation of plan provisions requiring decision by another body].

Turning to the merits of the case, the Ninth Circuit decided that, under the "abuse of discretion" standard, interpretation of the Plan must be controlled by extrinsic evidence of *unwritten* past practices as to the manner in which the Plan was funded, despite the fact that Chevron could point to no plan documents setting forth this funding arrangement. With respect to the District Court's finding that the manner in which Chevron administered the Plan rendered the term "regular work schedule" superfluous and therefore improper under *de novo* review, the Circuit Court held that "simply rendering a term superfluous does not raise it to the level of conflicting with the plain language of the plan" (page A-7-A-8).

REASONS FOR GRANTING THE WRIT

I.
THE RULE IN THE NINTH CIRCUIT TO IMPLY A GRANT OF DISCRETION TO THE ADMINISTRATOR OF AN ERISA PLAN IS CONTRARY TO THE RULE IN THE FIRST AND SIXTH CIRCUITS THAT REVIEW IS DE NOVO UNLESS THE PLAN CLEARLY GRANTS DISCRETION TO THE ADMINISTRATOR

As examples of language which conferred discretion on a fiduciary, the decision in *Firestone v. Bruch*, 489 U.S. 101, 111 (1989) cited *Nichols v. Eaton*, 91 U.S. 716 (1875) and *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985). *Nichols* was a case in which the plaintiff sued to force the trustees of a testamentary trust to pay out the corpus. The trust provided that "in case at any future period circumstances should exist, which, in the opinion of my said trustees, shall justify or render expedient [paying the corpus], then it shall be lawful for my said trustees, in their discretion, but without it being in any manner obligatory upon them, to transfer absolutely to my said children..." *Nichols v. Eaton*, *supra*, 91 U.S., at 718. The language of the trust unequivocally conferred discretion upon the fiduciary. The language at issue in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, *supra*, 472 U.S. at 568 provided that "any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees, and Employers." Here again, the grant of discretion was explicit and unequivocal.

Neither of the LTD Plans at issue herein contain any express language granting the Plan Administrator *discretion* to adjudicate disputes involving the amount of the benefit.

In fact, the 1981 Plan contains specific language that disputes are to be submitted to a panel. The 1986 Plan does not require appointment of a review panel, but it contains a separate section dealing with appeal of claims. The appeals section contains no language indicating that decisions of the claims reviewer are final and binding or that the claims reviewer has discretion to interpret the Plan.

Unlike the plan at issue in *Firestone*, the Chevron Long-term Disability Plan is a fully integrated, lawyer-drafted document. If the scrivener of the Plan intended to imbue the administrator or claims reviewer with discretion in the determination of appeals, the document would have explicitly so stated. See 4 Williston *Contracts* (3rd Ed.) § 621. Furthermore, as the District Court noted, the purpose of the LTD Plan and ERISA would be frustrated by giving the Plan Administrator discretion to determine the amount of benefit. The purpose of the LTD Plan is to provide a fixed and readily determinable sum which participants shall be entitled to in the event of disability. (See also discussion of 29 U.S.C. § 1102 in Section II, *infra.*)

The decision of the Ninth Circuit to imply discretion in an ERISA Plan where none is explicit, conflicts with the Supreme Court decision in *Firestone*. The decision of the Ninth Circuit in this case is, however, consistent with prior decisions of the circuit. In *Eley v. Boeing*, 945 F.2d 276 (9th Cir. 1991), the Court held that plan language that "the company retains final authority and responsibility for its plan and its operation" was a sufficient implied grant of discretion to avoid *de novo* review. As interpreted by the Ninth Circuit, almost any language which grants power to a plan administrator has been held to require review under the deferential "abuse of discretion" standard. This line of cases has effectively negated the effect of *Firestone* in the Ninth Circuit.

The Ninth Circuit rule is in conflict with decisions in the First and Sixth Circuits. *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 583 (1st Cir. 1993) requires *de novo* review in an ERISA case unless the benefits plan "clearly" grants discretion to the administrator. In *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d. 546, 550 (6th Cir. 1989), citing *Firestone*, the Court held:

> The purposes of ERISA are to promote and protect the rights of employees and their beneficiaries in employee benefit plans. Absent a clear grant of discretion to the administrator, application of the highly deferential arbitrary and capricious standard of review does not promote these goals.(citation omitted)

Accord, *Anderson v. Great West Life Assur. Co.*, 942 F.2d 392, 394-395 (6th Cir. 1991).

In conflict, decisions in the Seventh and Eighth Circuits hold that the "abuse of discretion" or "arbitrary and capricious" standard is applicable to review decisions of an administrator to deny benefits under employee benefit plans even where there is no explicit grant of discretion to the administrator. *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990) Accord, *Anderson v. Operative Plasterers & Cement Masons*, 991 F.2d 356,358 (7th Cir. 1993), and *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541, 543-545 (8th Cir. 1989). But see also dissenting opinion of Judge Hanson, *Id.* at 874 F.2d 545-546.

In *Block v. Pitney Bowes Inc.*, 952 F.2d 1450 (D.C. Cir. 1992), the Court held that the proper standard of review must be determined based on a rational analysis of the breadth of the administrator's power. The Court specifically repudiated Block's reliance on a provision in a section of the plan governing management of assets to determine whether the plan granted the administrator discretion to decide

whether he was disabled. Block's argument was similar to Chevron's contention herein, i.e., that in determining whether the administrator had discretion to decide appeals, language in a section of the Plan generally setting forth the administrative powers and responsibilities of the plan administrator should override specific language governing the determination of appeals.

Effect of Rule Implying Discretion

A rule requiring application of the "abuse of discretion" or "arbitrary and capricious" standard whenever an administrator is given power to interpret a benefits plan, has the effect of making the "abuse of discretion" standard the rule in virtually all benefits plans. Although it is unusual for a benefits plan to state that determination of the amount of the benefit is entrusted to the administrator's discretion, virtually all plans contain language implicitly or explicitly granting the administrator some power to interpret the plan document. Without interpretation, a plan document is no more than black marks on a piece of paper. Interpretation of a plan document is necessary in the first instance to establish a benefits organization, collect premiums, and make an award of benefits. It is a far different matter to give the trustee discretion to determine the amount of benefit payable under the plan. As this Court stated in *Firestone*:

> . . . Firestone argues that as a matter of trust law the interpretation of the terms of a plan is an inherently discretionary function. But other settled principles of trust law, which point to *de novo* review of benefit eligibility determinations based on plan interpretations, belie this contention

Firestone v. Bruch, supra, 489 U.S. 101, 112.

The Ninth Circuit rule requiring application of the "abuse of discretion" standard in all plans which grant the power to interpret the plan to the administrator has resulted in a

radical change of law in the area of interpretation of employee benefit plans in California. Prior to ERISA, employee benefit plans in California were governed by California law. Under California law an employee was entitled to any benefit which the benefit plan could be "reasonably read" to provide. *Bareno v. Employers Life Insurance Co.*, 7 Cal.3d 875-884 (1972). This was a rule of *contraproferentem* against the drafter of the benefits plan (i.e., the employer or insurer).

Under the abuse of discretion standard as applied by the Ninth Circuit, an administrator's decision will not be overturned unless it "clearly conflicts with the plain language of the plan." *Johnson v. Trustees of Western Conference of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Circuit 1989). This is a standard which requires reverse *contraproferentem* against the beneficiary employee in the interpretation of benefits contracts. The employer or insurer will be given the benefit of any interpretation of the contract which can be reasonably read from the contract document. This application of ERISA law is contrary to the decision of the Supreme Court in *Firestone* which counseled against shifting away from long accepted rules for interpretation of employee benefit plans:

> The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim — by looking to the terms of the plan and other manifestations of the parties' intent.

Firestone v. Bruch, *supra*, 489 U.S. 101, 112-113. A rule which generally *requires that employee* benefit plans be interpreted against the beneficiary is also contrary to the intent of ERISA, which was enacted as remedial legislation to protect the benefits of employees. To allow the Ninth Circuit rule of construction of ERISA contracts to stand will adversely impact the employee benefits of millions of employees in this country. A vital issue is raised in this case and this Court should issue its writ to consider this question.

II.
CONSTRUCTION OF AN ERISA PLAN TO GIVE THE ADMINISTRATOR DISCRETION TO DETERMINE THE AMOUNT OF PAYMENTS IS CONTRARY TO THE REQUIREMENT OF 29 U.S.C. 1102 THAT THE BASIS ON WHICH PAYMENTS ARE MADE MUST BE SPECIFIED IN WRITING

ERISA was passed, inter alia, to create uniform national rules for employer-sponsored benefit programs. A primary protection provided by ERISA is that all benefit plans shall be governed by a written instrument which must "specify the basis on which payments are made to and from the plan." 29 U.S.C. §1102(b)(4). To effectuate a uniform federal policy, ERISA allows employees to sue in federal court for alleged abuses of benefits plan administration. 29 U.S.C. 1132(a). The standard of review was left for development by federal courts. Most federal courts initially reviewed employee challenges under the "arbitrary and capricious" standard. *Heidger v. Olin Corp.*, 906 F.2d 903, 907 (2nd Cir. 1990). Some federal courts were uncomfortable with this deferential standard of review. This was particularly so in the Third Circuit, which developed a rule requiring a *de novo* standard of review if the plan administrator is operating under a conflict of interest. *Firestone Tire and Rubber Company v. Bruch*, 828 F.2d 134 (3rd Cir. 1987). The Supreme Court granted certiorari in

Firestone v. Bruch, 489 U.S. 101 (1989) to resolve this conflict between the Circuits as to the proper standard of review . While agreeing with the Third Circuit that *de novo* review is appropriate in some cases, the Supreme Court refused to use "conflict of interest" as the litmus test to determine the appropriate standard of review. The Supreme Court held instead that the standard of review should be determined by whether or not the plan administrator has been granted discretion with regard to the matter at issue. Unless the plan grants the administrator discretion, review would be de novo whether or not a conflict of interest exists. *Id.* at 115.

In the intervening five years the federal judiciary has wrestled with the meaning of *Firestone*. The focus has became one of semantics, to determine whether or not the plan document contains "magic words" which grant the administrator discretion and therefore insulate the administrator from *de novo* review. Some courts have criticized this search for magic words. In *Block v. Pitney-Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) the Court held:

> The Court in *Firestone* surely did not suggest that "discretionary authority" hinges on incantation of the word "discretion" or any other "magic word." Rather, the Supreme Court directed lower courts to focus on the breadth of the administrators' power — their "authority to determine eligibility for benefits or to construe the terms of the plan." (citation omitted)

See also *De Noble v. Vitro Corporation*, 885 F.2d 1180 (4th Cir. 1989). Despite this caveat, the legal community has for the most part treated *Firestone* as simply directing a drafting exercise which will ultimately render the decision irrelevant once employers have had sufficient time to amend

their plans to contain the requisite magic words of discretion.

In this analysis, sight has been lost of the requirement that all plans "specify the basis on which payments are made to and from the plan." 29 U.S.C. §1102(b)(4). This provision has been described as requiring "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R.Rep. No.1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5077-78 cited by *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 97 (3rd. Cir. 1990). A benefits plan which gives the administrator discretion to determine issues such as the *definition of eligibility or the amount of benefits* clearly runs afoul of the requirements of 29 U.S.C. § 1102. On the other hand, a plan which gives the administrator discretion to determine issues such as whether an individual's medical condition meets the plan definition of disability, is not in conflict with 29 U.S.C. § 1102.

29 U.S.C. § 1102 requires that every plan must provide a benefit which is definitely determinable upon reading the plan document. A benefit is definitely determinable if the amount of the benefit, its duration, and the persons eligible to receive it are ascertainable from the plan document. Thus, a benefit is not definitely determinable if the rules governing either its amount, its duration, or its recipients are not ascertainable from the plan document, but are instead subject to the discretion of a person or committee. Likewise, a benefit is not definitely determinable if a beneficiary's benefit amount is based upon a percentage of an item that is within the discretion of the employer.

29 U.S.C. § 1102 places limits on the extent to which courts can imply discretionary power to an administrator. For an employee to be able to determine where he or she stands with regard to the definition of eligibility or the

amount of benefit by reading the plan document, the meaning of the plan must be apparent from an independent or *de novo* review of the plan documents. Federal courts must recognize that the construction of a benefit plan which gives the administrator discretion to determine eligibility or the amount of benefit is contrary to 29 U.S.C. § 1102. Accordingly, disputes which raise these issues are entitled to *de novo* review under the rule announced by the Supreme Court in *Firestone*.

The purpose of 29 U.S.C. § 1102 is clearly frustrated by review under the "arbitrary and capricious" standard with respect to issues involving the definition of disability or the amount of benefit. Under the arbitrary and capricious standard as applied by the Ninth Circuit, an administrator's interpretation of the plan will not be overturned unless it "clearly conflicts with the plain language of the plan." *Johnson v. Trustees of Western Conference of Teamsters*, 879 F.2d 651 (9th Cir. 1989). In the words of *Fuller v. CBT Corp.*, 905 F.2d 1055, 1058 (7th Cir. 1990), a plan beneficiary must show that the administrator is "not just clearly incorrect, but downright unreasonable." Under this standard an administrator's interpretation of issues of eligibility or the amount of benefit will be allowed to stand even if the administrator's interpretation is not the apparent or obvious meaning of the plan. This is clearly contrary to the protection provided by 29 U.S.C. § 1102.

The decision of the District Court in the instant case construed the plan in a manner consistent with 29 U.S.C. § 1102. Rather than focusing solely on "magic words," the District Court also evaluated the nature of the dispute at issue. The District Court wrote:

> To the extent that the administrator possesses the power to decide anything, it may do so only as permitted by the terms of the plan... [The administrator's] decision did not invoke a

> discretionary authority, but only the administrator's interpretation of the plan's *benefit language*. The administrator did not have the authority to select a level of benefits for an employee based on a particularized evaluation of that employee's needs or other undefined criteria. The decision involved only an application of plan language and was not a discretionary decision. The appropriate standard for this Court's review is therefore *de novo* (emphasis added) (pages A-13-A-14).

Review Under a Deferential Standard Does Not Give Effect to the Apparent Meaning of the Plan

In reversing the District Court and reviewing the administrator's actions under a deferential standard of review, the Ninth Circuit applied a rule of reverse *contraproferentem*, interpreting the Plan against the employees in determining the amount of benefit. This resulted in an interpretation of the plan which would not be apparent to an employee reviewing the plan to determine his or her rights. This is clear from a review of the history of this case.

The District Court and the professional benefits administrator decided that the benefit amount was to be determined by a formula which included the actual regular work schedule of the seamen. The term "regular work schedule" was carefully and specifically defined in the benefits contract to mean the actual hours of work. The District Court held that to ignore the seamen's actual hours of work in calculating the LTD benefit was to excise the term "regular work schedule" from the contract.

In its decision reversing the District Court, the Ninth Circuit stated, "Even assuming Marte's claim as true, simply rendering a term superfluous does not raise it to the level of conflicting with the plain language of the Plan." (pages A-7-A-8) Then in a footnote, the Ninth Circuit suggested a

plausible explanation, advanced by Chevron on appeal,[8] for why the Plan would use the term "regular work schedule" to mean 40 hours a week—that being, if an employee had worked an abnormally curtailed schedule just prior to disability, benefits should be calculated based on the regular work schedule instead of the short week or weeks (Court of Appeals Decision, fn 4).[9] In reaching for a plausible explanation, the Ninth Circuit ignored the ordinary or most obvious explanation of the terms which the District Court found, using all the plan language, under the *de novo* standard of review. As the Court stated in *Burnham v. Guardian Life Ins. Co. of America*, 873 F.2d 486, 489-490 (1st Cir. 1989), under *de novo* review, a contract must be interpreted so as to give effect to all its terms.

Thus, this case demonstrates why discretion should not be implied by a court to reach a deferential standard of review. Under a deferential standard, the meaning of the plan which should be apparent to an employee seeking to learn his or her rights from reading the plan (or plan summary) is not

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[8] In his decision on the sailors' appeals, the plan administrator had a completely different explanation for its interpretation of "regular work schedule" which was that the collective bargaining agreement had to be looked to in defining this term. The Circuit Court tacitly rejected this explanation.

[9] Petitioners do not concede that the interpretation suggested by the Ninth Circuit is a plausible explanation of the term "regular work schedule" in the contract. The contract specifically defines "regular work schedule" as "the continually recurring pattern of scheduled work for a job *established and changed* as necessary by the corporation for a job in *each work week or period of work weeks* to meet operating needs (emphasis added). If anything, this definition would cause a problem for an employee who had worked an abnormally curtailed work schedule in the week or weeks just prior to disability. If the purpose of the term "regular work schedule" was to cover a situation in which an employee had an abnormally curtailed week at the end of his employment, the definition would certainly not refer to weekly changes in the work schedule.

given effect. This abrogates the protection of 29 U.S.C. § 1102(b)(4) which requires that an employee be able to determine payments due by reviewing the plan document.

III.
THE DECISION OF THE NINTH CIRCUIT TO IMPLY DISCRETION TO AN INDIVIDUAL WHO DOES NOT HAVE AUTHORITY UNDER THE PLAN IS IN CONFLICT WITH DECISIONS IN THE FIRST CIRCUIT

The 1981 Benefit Plan required that disputes with regard to benefits be submitted to a review panel of three or more persons. The Circuit Court recognized that the Plan was violated when the decision to deny ERISA appeals under the 1981 Plan was made by an official in the Benefits Department without referral to a review panel. The Circuit Court dismissed this violation of the Plan in determining the standard of review, stating that there is "no substantive right to a certain plan procedure." (page A-7) Petitioners do not contend that the procedural violation entitled them to any benefit. The right to the benefit arose from the definition of the benefit in the plan document. However, the First Circuit in *Rodriguez-Abreu v. Chase Manhattan Bank,* 986 F.2d 580, 583-584 (1st Cir. 1993), recognized that where benefits decisions are made by a company official who is not clothed with authority to decide appeals arising under the Plan, review cannot be under a deferential standard. In *Rodriguez-Abreu,* the plan provided that the Named Fiduciaries have discretion in interpreting the meaning of plan provisions and in determining questions of fact. The plan provided that the Plan Administrator was responsible for publication of information and filing of reports. The evidence in the case showed that the Plan Administrator, rather than the Named Fiduciaries, had decided the em-

ployee's benefits claim. The employer argued that there had been an implied delegation of fiduciary duties, but could point to no documents supporting this claim. The Court held:

> Because the relevant plan documents did not grant discretionary authority to the Plan Administrator and the Named Fiduciaries did not expressly delegate their discretionary authority to the Plan Administrator, we find that the District Court correctly employed the de novo standard of review. Id. 986 F.2d at 584.

In *Firestone Tire and Rubber Co. v. Bruch, supra*, this Court looked to trust law as a guide in finding the proper standard of review for ERISA claims. It is settled trust law that if a trust instrument confers discretionary authority on two or more trustees, the same discretion cannot be exercised by a single trustee acting alone. Restatement Second Trusts, § 194; 3 Scot Trust (4th Ed. 1988), § 194 and § 195, fn 4. In this case, the Plan clearly required referral of ERISA appeals to a panel of three persons or more. Even if the Plan had given the appeals panel discretion in interpreting the benefits plan, the Chevron LTD Plan clearly did not grant discretion to an official in its Benefits Department to decide claims acting alone.

This Court should issue its Writ to reconcile this conflict between the Ninth Circuit and First Circuit on this question.

IV.

THE CIRCUIT COURT'S RELIANCE ON PAROLE EVIDENCE TO INTERPRET AN UNAMBIGUOUS PLAN IS CONTRARY TO THE RULE IN OTHER CIRCUITS AND 29 U.S.C. § 1102 WHICH REQUIRES THAT PLANS BE GOVERNED BY THEIR WRITTEN TERMS

One of the specific protections mandated by ERISA is that the terms and conditions of a benefit plan must be set forth in writing. 29 U.S.C. § 1102(a)(1). ERISA provides further that "Every employee benefit plan shall specify the basis on which payments are made to and from the plan" 29 U.S.C. § 1102(b)(4). The decision of the Circuit Court in this case denied Petitioners the protection of this section by focusing on evidence of the basis on which premiums had been calculated, rather than on the Plan language. The Circuit Court held that Chevron's interpretation of the Plan had to be adopted when Petitioners' ERISA appeal was decided because:

> The . . . [appeal] reviewer was simply applying the plan language as previously interpreted by the administrator. This is evidenced by the fact that the Chevron administrator from the very beginning assessed employees a premium amount based on the 60% of wages earned for a 40 hour week. (Circuit Court decision pages A-6-A-7)

The evidence referred to is the declaration of an employee from the Chevron benefits department that the premiums which had been withheld from the sailors' pay to fund the LTD Plan had been calculated based on the "monthly wage" rather than the straight-time wages paid for the regular work schedule. The evidence of this funding arrangement was not set forth in any plan documents. The sum total of this evidence was oral testimony committed to

declarations for the purpose of cross-motions for summary judgment.

The Circuit Court specifically stated that it was *not* clarifying an ambiguous plan document.[10] The Court held that ". . .this court finds the language of the plan is unambiguous. . ." (page A-7).

The Circuit Court's decision is in conflict with the body of ERISA law as interpreted by other circuits. In *Audio Fidelity Corporation v. Pension Benefit Guaranty Corporation*, 624 F.2d 513, 517-518 (4th Cir. 1980), the Court held that oral testimony is inadmissible to vary the unambiguous written terms of an ERISA plan. The Ninth Circuit's reliance on evidence of the premiums collected in determining the benefit due is in stark contrast to the decision in *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3rd. Cir. 1991). In that case, the employer increased the amount of coverage available under its life insurance plan. At the time of the increase, Gridley was off work due to a cancer which would later kill him. His wife was called in for a briefing on the new benefit. She signed up for the increased coverage and premiums were paid and accepted. After Gridley's death, it was discovered that to be entitled to the increased coverage, the employee would have had to return to work. In deciding the case, the Third Circuit held that the plan language and not the payment of premiums or the employer's or employee's mistake must govern. The

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[10]If the Circuit Court was going to rely on parole evidence, it should have also considered the fact that the sailors' pay sheets invariably showed that the "Disability Insurance Plan Base" was total pay including the amount paid for all hours worked. Furthermore, the brochures which were given to the sailors when they signed up for coverage stated that the benefit was 60% of "annual earnings" or 60% of "your pay." The District Court disregarded all extrinsic evidence offered by both sides to show the meaning of the plan because it held the benefit amount was controlled by the unambiguous plan language.

Third Circuit applied the same rule in *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3rd Cir. 1990), where an employer attempted to rely on internal memoranda of a meeting of its officers to vary the terms of its unambiguous severance plan. Colt argued that these memoranda showed the settlor's intent in setting up the plans. The Court held that to accept such evidence would be inconsistent with a basic purpose of ERISA "to ensure that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Id.* 910 F.2d at 97 citing H.R.Rep. No.1280, 93d Cong., 2nd Sess., reprinted in 1974 U.S.Code Cong. & Admin.News 4639, 5038, 5077-78. Furthermore, the Court noted "that trust law looks to the settlor's intent, but only the settlor's intent *as manifest in the trust instrument* is relevant, unless there is an ambiguity in the instrument." *Id.* 910 F.2d at 99 citing Restatement (Second) of Trusts § 4 comment c and § 38 comment a.

In *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986), the Court held that written employee benefit plans governed by ERISA may not be modified by oral agreements or informal written agreements. Accord, *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988). In the Fifth Circuit, *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989), held that recognition of oral agreements was incompatible with the requirement of 29 U.S.C. § 1102 that ERISA plans be governed by written instruments.

The evidence offered by Chevron of the basis on which premiums were assessed was clearly extrinsic to the plan documents. There was no evidence that this policy for assessing premiums had been adopted by a plan fiduciary or that the plan had adopted any written rules or interpretations embodying this policy. The decision of the Circuit Court in this case to interpret a benefits plan based on such an unwritten policy strikes at one of the primary

safeguards of ERISA, that plans must be in writing and that the written terms control. The requirement that employees be provided copies of plan summaries, and the plans themselves on request, is rendered meaningless if these documents cannot be relied upon to determine what benefit is due. The decision of the Circuit Court in this case is contrary to ERISA and in conflict with the holdings of the other Circuits.

CONCLUSION

Thus, this case presents serious conflicts between circuit courts as to standard of review in ERISA cases. As demonstrated by this case, ERISA's basic protection that plan benefits be specified by an enforceable written contract are negated by implying discretion to plan administrators. This Court should issue its writ in aid of ERISA's promise to provide an effective uniform, national law of employee benefit plans.

RESPECTFULLY SUBMITTED,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENRIQUETO MARTE,
Plaintiff-Appellee,

v.

CHEVRON CORPORATION LONG-TERM DISABILITY PLAN; CHEVRON CORPORATION LONG-TERM DISABILITY PLAN ORGANIZATION, a Delaware corporation; and CHEVRON CORPORATION,
Defendant-Appellants.

DANIEL ARUTA, EARL KAUKA, and JACINTO ALMERIA,
Plaintiff Intervenors-Appellees.

No. 92-15798
D.C. No. CV-89-4510-CAL
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted October 7, 1993
San Francisco, California

Before: THOMPSON and O'SCANNLAIN, Circuit Judges, and NIELSEN, District Judge.**

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**Hon. Wm. Fremming Nielsen, United States District Judge, for the Eastern District of Washington, sitting by designation.

OVERVIEW

Chevron Corporation Long Term Disability Plan [Chevron] appeals a district court grant of summary judgment for plaintiff, Enriqueto Marte, and plaintiff-intervenors, Daniel Aruta, Earl Kauka and Jacinto Almeria. The district court held that Chevron as administrator of the long term disability [LTD] plan under calculated the level of benefits due the plaintiffs [hereinafter Marte]. Chevron's appeal claims (1) the district court applied an incorrect level of review, *de novo* instead of abuse of discretion; and (2) the district court misinterpreted the phrase "straight time wages" to include wages for hours worked in excess of 40 hours per week. We agree and reverse.

STATEMENT OF THE CASE

A. Statement of Facts

The four seamen appellees worked as crew members on Chevron oil tankers. While on the tankers for one to three months at a time, their schedules varied day to day, they worked as needed, regularly greatly in excess of 40 hours per week. This work period would then be followed by a month at home during which they were not required to work yet drew a monthly wage which paid as if they had worked 40 hours per week.

1. The Plan

There are two LTD plans at issue. Appellees Almeria and Aruta were injured before 1986, when the 1981 LTD plan was in effect. Appellees Marte and Kauka were injured when the 1986 plan was in effect. The 1981 and 1986 plans conferred substantially the same benefits. However, there is a procedural difference as the 1981 plan provided that an employee's request for review of a benefits denial would be submitted to a three-person review panel. The 1986 plan, on

the other hand, provided that a single claims reviewer would decide all appeals.

Until 1986, the plan was entirely funded by employee contributions and these contributions were calculated on an employee's 40 hour work week. Thereafter, Chevron funded the plan for employee earnings up to $25,000. If an employee's earnings, as defined by the plan, exceeded $25,000, the employee could self-fund the excess. Marte and Kauka both opted to self-fund. When calculating the premiums owed by an employee, Chevron never included overtime earnings. Further, since Marte's and Kauka's pay excluding overtime never exceeded $25,000, no deductions were taken from their pay checks after 1986, even though their gross pay was far in excess of $25,000.

a. Benefits

The plan insures a disabled employee will receive a monthly plan benefit in the amount of 60% of the employee's monthly "earnings" immediately prior to the commencement of a disability.[3] The plan defines earnings as "the straight time wages or salary payable to an employee from the regular work schedule." The definition of "regular work schedule" in turn is defined as "the continually recurring pattern of scheduled work established and changed as necessary by the Corporation for a job in each work week or period of work weeks to meet operating needs." Upon being eligible for LTD benefits, Chevron awarded Marte 60% of his pay based on a 40 hour work week. Marte appealed and requested 60% of his total pay including overtime wages. The plan's reviewer affirmed the initial determination. After unsuccesfully completing the appeals process, Marte initiated this federal action.

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[3]The plan does not always pay the full 60% benefit, as benefits such as social security are deducted from the plan award.

b. Administrative provisions.

The plan provisions directing administration and operation provides that the administrator "shall make such rules, regulations, interpretations and computations and shall take such other action to administer the plan as it may deem appropriate." It was the plan administrator's duty to estimate the level of contributions to be made to the plan by the corporation and its members. At no time did the contributions requested by the plan cover amounts earned during overtime work.

2. The anomaly.

The plan has indemnification agreements with Connecticut General Life Insurance Company [CIGNA]. In 1988, Rolando Gerbacio applied for LTD benefits and was informed that the benefits were based on his pay excluding all overtime hours. When Mr. Gerbacio appealed the amount of his benefits, CIGNA assumed that since it had financial responsibility, it should serve as the appeals panel. CIGNA decided that Mr. Gerbacio's benefit should include his overtime hours, over the disagreement of the plan administrator. Then CIGNA and Chevron, prior to Marte's appeal, decided that the plan administrator had at all times the duty to decide all appeals.

B. Proceedings Below

The district court held that the standard of review was *de novo* because it found the plan did not confer discretionary powers upon the administrator. The court held that because there was no adjudicative authority, the administrator's decision involved only an application of the plan language, a process the court felt was not discretionary in nature.

C. Discussion

Jurisdiction is proper under ERISA, 29 U.S.C. § 1132.

1. Standard of Review.

A district court's grant of summary judgment is reviewed *de novo. Dytrt v. Mountain State Tel & Tel Co.*, 921 F.2d 889, 893 (9th Cir. 1990). However, this court applies an abuse of discretion standard when reviewing the action of an ERISA plan administrator if the plan confers "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In so deciding, the Supreme Court looked to the principles of trust and law and held that "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers." *Id.* at 111.

By its provision that the plan administrator "shall make such rules, regulations, and interpretations . . . to administer the plan as it may deem appropriate," the plan confers discretionary authority upon the administrator to construe the terms of the plan. Though it is true that the plan language does not confer discretionary authority on the administrator for all plan activities, such is not necessary for this decision. The Supreme Court in *Firestone* relied upon the Restatement 2d of Trusts § 187 for its decision. Section 187 provides that when discretion is "conferred upon the trustee with respect to the exercise of a power, [then] its exercise is not subject to control by the court." *Id.* A reasonable inference from use of the phrase "exercise of a power" is that some powers of a trustee could be discretionary and subject to abuse of discretion review while others would be subject to *de novo* review because the power is non-discretionary.

As the district court noted, this case turned on the administrator's interpretation of the plan's language and "involved only an application of [that] plan['s] language." Though the plan does not confer discretionary authority upon the administrator as to all matters, it does confer

enough to merit the abuse of discretion standard of review for purposes of this appeal.

Marte argues the plan's grant of power to interpret is not synonymous with a grant of discretion, citing *Firestone*. Though *Firestone* does hold that interpretation of plan terms is not an inherently discretionary function, 489 U.S. at 112, Marte takes this language out of context. Just prior to this holding, the Court noted that the plan at issue lacked language which would merit an arbitrary and capricious standard. *Id.* In contrast, Chevron's plan language supports an arbitrary and capricious standard as it clearly vests discretionary authority in the administrator to make interpretations of plan language.

Marte also argues that there is no specific language toshow that the administrator has an exclusive right to make interpretations or that the decisions shall be final, conclusive and binding. However, no case cited by Marte requires special "magic words." A persuasive case to the contrary and on point is *De Nobel v. Vitro Corp.*, 885 F.2d 1180, 1187 (4th Cir. 1989), wherein the court held "[t]here are obviously no magic words required to trigger the application of one or another standard of judicial review. In this setting, it instead need only appear on the face of the plan documents that the fiduciary has been 'given [the] *power* to construe disputed or doubtful terms' . . . in which case 'the trustee's interpretation will not be disturbed if reasonable.'" *Id. quoting Firestone*, 489 U.S. at 111.

Plaintiffs Almeria and Aruta, both injured prior to 1986, argue *de novo* review is required because Chevron breached the plan terms by utilizing a single in-house reviewer instead of the three person panel outlined in the 1981 plan. Plaintiffs must fail for any of three reasons. First, the result should not have been different even if a panel made the decision. The single reviewer was simply applying the plan language as previously interpreted by the administrator. This is

evidenced by the fact that the Chevron administrator from the very beginning assessed employees a premium amount based on 60% of wages earned for a 40 hour work week. Though plaintiffs argue the assessment was incorrect and done through oversight, intention or mistake, no evidence was presented to support this allegation.

Second, Almeria and Aruta have no substantive right to a certain plan procedure. *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991). Third, the plaintiffs cite no authority for the proposition that a procedural breach of plan terms automatically imposes *de novo* review.

2. Review of the Plan.

As an initial matter, this court finds the language of the plan is unambiguous and that "straight time" refers to the regular 40 hour work week. Therefore a ruling for Chevron is warranted. However, even if the language were ambiguous, Chevron would still prevail.

Under the abuse of discretion standard of review, a plan administrator's interpretation of an ambiguous term will be upheld as long as it does not conflict with the plain language of the plan. *Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991). Chevron has interpreted "earnings" upon which benefits are calculated, to only include wages received for a 40 hour work week. The burden is upon Marte to show that Chevron's interpretation of the term "earnings" clearly conflicts with the plain language of the plan. *Id.* Marte attempts to satisfy this burden by claiming the phrase "regular work schedule" is rendered superfluous within the definition of earnings when employing Chevron's interpretation. Even assuming Marte's claim as true, simply

rendering a term superfluous does not raise it to the level of conflicting with the plain language of the plan.[4]

Marte correclty points out that if an administrator "is operating under a conflict of interest, the conflict must be considered in determining whether an abuse of discretion has occurred." *Eley*, 945 F.2d at 278-79. Further, "if the employer is the administrator, a conflict ordinarily exists." *Id.* at 279. This contention does not save the day for Marte. If Chevron's interpretation of the term is consistent with the plain language of the plan, the alleged conflict is irrelevant. *Id.* Having already determined above that Chevron's interpretation does not conflict with the plan, this court holds that Chevron's interpretation is consistent with the plan language. Further, Chevron was not operating under a conflict of interest when it initially interpreted the benefits level. At the time Chevron initially assessed the premium, the plan was fully employee funded and Chevron did not have a vested interest when it construed the plan language. Therefore Chevron did not abuse its discretion when it limited the benefits calculation to earnings based on a 40 hour work week and excluded all overtime hours from consideration.

Marte argues that when CIGNA awarded Gerbacio benefits based on his wages including overtime, Chevron took over the duties of claims reviewer in order to avoid the same result in the plaintiffs' cases. Marte argues this

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[4]Marte is incorrect in his claim that "regular work schedule" is rendered superfluous by limiting the term "earnings" to wages paid for a 40 hour work week. The phrase "regular work schedule" is necessary in case an employee had an abnormally curtailed work schedule in the weeks preceding a disability. Marte's contention that a curtailed schedule is already covered under the plan's definition of predisability earnings is incorrect. The phrase "predisability earnings" only covers the situation when an employee worked fewer hours prior to the disability because of illness.

evidences an abuse of discretion because it is an inconsistent and irregular handling of claims. However, since Chevron always calculated the premiums based on a 40 hour work week wage, Chevron's action as to Marte was in keeping with the plan's original funding. Any inconsistencies and irregularities are to be found in the Gerbacio decision.

3. Attorney's fees.

Chevron's request for attorney's fees is denied as (1) there is no evidence of bad faith on the part of Marte for bringing this appeal; (2) Marte's ability to pay is not apparent; (3) the suit raises a significant ERISA question; and (4) Marte's position had merit. *Arnold v. Arrow Transportation Co.*, 926 F.2d 782 (9th Cir. 1991).

CONCLUSION

The district court erred in utilizing the *de novo* standard for review of this case. Under the appropriate standard of abuse of discretion, Chevron prevails. The decision below is **REVERSED**. This cause is **REMANDED** to the district court with instructions to enter summary judgment in favor of Chevron.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENRIQUETO MARTE,
Plaintiff,

v.

CHEVRON CORPORATION LONG-TERM
DISABILITY PLAN, *et al.*
Defendants.

No. C-89-510-CAL

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Enriqueto Marte filed this action seeking relief under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, regarding a long-term disability plan established by his employer, Chevron Corporation. Three additional employees joined in the action as plaintiff-intervenors.

Plaintiffs and defendants have each moved for summary judgment on the question of whether the level of disability benefits should be calculated based on a percentage of total earnings including overtime, or rather based on a percentage of straight-time earnings not including overtime. In addition, plaintiff Marte moves for summary judgment on whether he was entitled to receive long-term disability

benefits until the time he began receiving payments under the employee retirement plan.[1]

The issues before the court on these motions are questions of contract interpretation and law, and do not raise any genuine issues of material fact. The court has reviewed the moving and opposing papers, the arguments of counsel, the record and the applicable authorities.

I.

Plaintiffs were Chevron employees working as crew members on oil tankers. Plaintiffs were covered by the terms of a collective bargaining agreement between Chevron and the Sailors Union of the Pacific ("CBA"). Due to the nature of the work on oil tankers, plaintiffs typically spent two or three months at a time working abroad a ship, and then would have a month of home leave. During their time at sea, plaintiffs would earn a monthly wage rate, plus considerable overtime pay. While plaintiffs were at home, they would perform no work but would collect their monthly wages.

Plaintiffs became disabled between 1983 and 1987 and applied for disability benefits under the long-term disability plan.[2] The plan is subject to the ERISA statute. The plan

[1]Plaintiffs have voluntarily dismissed their claims regarding the distribution of information about the long-term disability plan.

[2]There are two sequential plans applicable to this dispute. Plaintiff intervenors Aruta and Almeria, who became disabled in November 1983 and August 1985, respectively, are governed by the 1981 plan. The disability benefits of plaintiff Marte and plaintiff intervenor Kauka are governed by the disability plan effective July 1, 1986. However, the

writings stated that disabled employees would obtain benefits of sixty percent of their "regular" earnings, without specifying whether such earnings included overtime or were limited to the straight-time monthly wage set forth in the CBA.

In calculating plaintiffs' disability benefits, the plan administrator paid plaintiffs sixty percent of their monthly wages defined in the CBA. The result was that plaintiffs received only twenty-five percent of their usual at-sea pay, which included considerable overtime pay. Plaintiffs appealed these determinations to an internal review process, which denied their appeal. Plaintiffs then filed this action.

II.

The initial question is whether the decision of the plan administrator, to calculate plaintiffs' benefits based only on their monthly wage rate, is reviewed by this court *de novo* or only for an abuse of discretion.

This question of law under ERISA is not clearly resolved. The U.S. Supreme Court has established a distinction between cases in which the district court reviews a plan administrator's decisions *de novo* and those in which the court reviews such decisions only for an abuse of discretion. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S.101, 115 (1989) the Supreme Court held that "a denial of benefits under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for

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terms of the plans are not materially different, and the 1981 and 1986 plans are collectively referred to as the "plan" in this order.

benefits or to construe the terms of the plan." *Id.* If the administrator has discretionary authority, the court is to review the administrator's determinations only for abuse of discretion. *See Johnson v. Trustee of Western Conference of Teamsters Pension Trust Fund*, 879 F.2d 651, 654 (9th Cir. 1989). An administrator's decision will not then be overturned unless it "clearly conflicts with the plain language of the plan." *Id.* at 654.

The issue is what powers the plan gives to the plan administrator. *Bogue v. Ampex Corp.*, 750 F.Supp. 424, 428 (N.D.Cal. 1990) (plan which grants authority to administrator to determine questions of eligibility and coverage is sufficient to demonstrate discretionary authority); *St. Mary Medical Center v. Cristiano*, 724 F.Supp. 732, 741-42 (C.D.Cal. 1989) (administrator has power to "determine all questions of interpretation, policy or administration"). This requires interpretation of the plan definition of the powers of the administrator. The plan at issue here empowers the administrator to: "make such rules, regulations, interpretations and computations and . . . take such other action to administer the Plan as it may deem appropriate."[3]

This language does not itself grant *discretionary* power to the administrator. The plan administrator is given administrative power but not adjudicative authority. To the extent that the administrator possesses the power to decide anything, it may do so only as permitted by the terms of the plan. The administrator here calculated plaintiffs' benefits based on their straight-time wages, as opposed to straight-

[3]1986 Plan, § 9(a); 1981 Plan, § 10(a)(ii).

time plus overtime pay. That decision did not invoke a discretionary authority, but was only the administrator's interpretation of the plan's benefit language. The administrator did not have the authority to select a level of benefits for an employee based on a particularized evaluation of that employee's needs or other undefined criteria. The decision involved only an application of plan language and was not a discretionary decision. The appropriate standard for this court's review is therefore *de novo*.

III.

Under a *de novo* standard of review, this court must look to the "terms of the plan and other manifestations of the parties' intent" (*Firestone*, 489 U.S. at 112-113) to determine whether the plan provided for benefits based on straight-time wages or straight-time plus overtime. The court looks to the plan language, the plan summary, and to a lesser extent other contemporary documents. Plaintiffs did not receive a copy of the plan but received a summary of its terms. To the extent that there are inconsistencies among the key documents, the court looks to the documents that are distributed to the employees. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 907 (2nd Cir. 1990). Other contemporary documents such as payroll slips do not purport to inform employees about their rights under a plan; and therefore while such documents may shed light on the employees' contributions to the plan, payroll records are not a reliable indicia of the intent of the parties. Finally, the court does not consider any alledged oral representations regarding the terms of the plan. The written terms of the plan may not be superseded by oral undertakings on the part of the employer.

Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986). Ambiguities should generally be resolved against the party who prepared the contract over which there was no negotiation.

IV.

As stated in footnote two, there are two disability plans at issue. However, both plans contain virtually identical language regarding the provisions material to this dispute. There are also some differences between the respective plan summaries distributed to the employees. But again, any differences in the summaries have little bearing on the question of contract interpretation before this court. Plaintiffs have not demonstrated any inconsistencies between the summaries and the plans. Therefore, this court will interpret the plan language to resolve the issue of what pay base should be used to calculate disability benefits.

Both the plan and the summary state that an employee will receive long-term disability benefits of sixty percent of his "regular pay."

"Regular pay" is defined as: "The straight-time wages or salary paid for an employee's regular work schedule. . . ."[4] "Regular work schedule" is defined as: "The continually recurring pattern of scheduled work for a job established and changed as necessary by the Corporation."[5]

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[4]1986 Plan, § 15(h); 1986 Summary (Benefits Almanac) at 132; 1981 Plan, § 12 (e); 1981 Summary (Benefits Almanac) at 225.

[5]1986 Plan, § 15(x); 1981 Plan, § 12(k); 1981 Plan Summary (Benefits Almanac) at 225.

"Straight-time wages" is not a defined term, but is generally understood to mean the standard wage rate for a forty-hour work week, not including overtime.

The question is how to relate those definitions. There are alternatives in the interpretations. One would start by reading the definitions of regular pay and regular work schedule separately. The regular work schedule constitutes all hours that Chevron requires an employee to work, which necessarily includes any overtime. But those two terms are mutually exclusive, since regular pay could not refer both to an employee's compensation for only forty hours per week (straight-time wages), and at the same time straight-time wages plus any overtime earned (regular work schedule). Since ambiguities must be construed in favor of plaintiffs, under this first interpretation the court would be required to in essence strike "straight-time" wages from the definition of regular pay. The plan would then require an employee's disability benefits to be based on a percentage of regular plus overtime earnings. But this interpretation does violence to the language of the plan, because it requires that the term "regular work schedule"must be divorced from its modifier, "straight-time wages." Rules of construction generally require incorporation of a defined term into the phrase which uses that term, and require an attempt to give consistency to the language as a whole. This leads to a second interpretation.

The alternative interpretation incorporates the definition of regular work schedule into the definition of regular pay. "Straight-time wages" would then control and combine with the term "regular work schedule." "Regular pay" would thus equal an employee's straight-time wages paid for the

hours that he is regularly scheduled to work. However, this second interpretation also contains alternatives. There are two possible ways to interpret how the term "straight-time wages" combines with "regular work schedule." One definition of regular could include only those hours during which an employee was paid regular wages, and overtime hours would not be included. For the purposes of calculating disability benefits, an employee's regular pay would be limited to to straight-time wages, *i.e.* remuneration for forty hours of work per week. This is the interpretation that the plan administrator used.

The second option is to understand straight-time *wages* to be the multiplier of the scheduled *hours* an employee works, including overtime *hours*. Since overtime wages are a percentage of the straight-time rate, an employee always earns some straight-time wages for each hour worked; that is, during overtime hours, an employee earns a straight-time rate plus some additional percentage of the straight-time rate. Any overtime pay that an employee earned is not then counted as "regular pay" for calculating benefits under the plan. The result is that the employee's regular earning equals: the total of the straight-time wage *rate*, multiplied by the total number of *hours* in the employee's regular work schedule, including overtime *hours*.

The court believes that this last definition is the one to be used. It gives effect to all of the language of the definitions. And it also resolves the reasonable ambiguities in favor of plaintiffs. Accordingly, plaintiffs' disability benefits should be calculated as 60 percent of the number of *hours* each plaintiff worked, straight time and overtime, multiplied by the straight-time wage rate paid to each plaintiff.

V.

Plaintiff Marte also alleges claims that defendants violated ERISA by failing to make timely benefit payments. Specifically, Marte seeks to recover for the time after he stopped receiving disability benefits and before he began receiving retirement benefits. This gap lasted from approximately March 31, 1989 to July 20, 1990. Marte included this claim in his appeal of the disability plan benefits decision. The appeals decision did not address this issue, and plaintiff brings it before this court for adjudication.

Based on the record before the court, this claim is not ripe for adjudication. Marte has filed a separate appeal regarding his *retirement* benefits with the internal review process. Plaintiff's claim regarding the timing of his *disability* benefits and his *retirement* benefits belongs as part of the adjudication of his retirement benefits appeal. However, either party may renew the motion for summary judgment after that issue is resolved.

VI.

A status conference is scheduled for January 31, 1992, at 11:00 a.m. The conference will consider what form of judgment can now be entered, and what further proceedings are necessary.

IT IS SO ORDERED.

DATED: January 2, 1992.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE